

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

**LIBERTY MUTUAL FIRE INSURANCE)
COMPANY,)**

***Plaintiff*)**

v.)

Docket No. 04-158-P-S

ERIC DUPERE,)

***Defendant*)**

RECOMMENDED DECISION ON DEFENDANT’S MOTION TO DISMISS

The defendant in this declaratory judgment action, Eric Dupere, moves this court to dismiss this action in the exercise of its “discretion under abstention principles and law.” Memorandum of Law In Support of Defendant Eric Dupere’s Motion to Dismiss (“Motion”) (attached to Defendant Eric Dupere’s Motion to Dismiss (Docket No. 9)) at [3]. I recommend that the court deny the motion.

The defendant, a resident of Maine, contends that “[e]ven if this Court has subject matter jurisdiction over the instant action,” it should not exercise that jurisdiction. *Id.* at [2]. He makes no attempt to demonstrate that this court does not have subject-matter jurisdiction in seeking a declaratory judgment with respect to insurance coverage for injuries arising from a motor vehicle accident in Vermont, Declaratory Judgment Complaint (“Complaint”) (Docket No. 1) ¶¶ 5, & 12 & demand for relief, and no basis to doubt the existence of subject-matter jurisdiction is apparent from the face of the complaint. Rather, the defendant contends that this court should decline to exercise jurisdiction because counsel for the

plaintiff, an insurer licensed to do business in Maine whose principal place of business is in Massachusetts, *id.* ¶ 1, was aware that the plaintiff planned to file an action against the plaintiff in Maine Superior Court seeking coverage under the insurance policy at issue, Motion at [2]. He asserts that the filing of this action represents “an attempt by the Plaintiff . . . to forum shop and take this case out of the Superior Court where the recent case [law] is favorable to [his] claim and bring it in Federal Court where the case law may favor Defendant Liberty Mutual Fire Insurance Company.” *Id.*

The complaint in this action was filed on July 20, 2004. Docket. The state-court complaint attached to the defendant’s motion, Exh. 2 to Docket No. 9, bears the heading of the Maine Superior Court, Cumberland County.¹ It was filed in that court on September 8, 2004. Contrary to the defendant’s representation that the plaintiff attempted to “usurp[] the Defendant[‘s] choice of forum” by filing this action, Motion at [1], that fact that he filed his state-court complaint almost two months after the plaintiff filed this action is, if anything, evidence directly to the contrary.

In addition, if Maine law were applicable to this dispute, this court would be bound to apply it in the same manner as would the courts of the State of Maine. There is no possibility whatever that filing the action in this court could result in the application of case law more favorable to the plaintiff than would be the case in a Maine state court. Further, as the plaintiff points out, Memorandum of Law in Opposition to Defendant’s Motion to Dismiss (Docket No. 10) at 2, once the defendant has filed an action in state court seeking the coverage that is the subject of the instant action, the plaintiff can, and apparently will, remove it to this court. 28 U.S.C. §§ 1332, 1441(a). The parties are citizens of different states and the amount in controversy exceeds \$75,000. Complaint ¶¶ 1-3. Thus the issue will be decided by this court in any event.

¹ The defendant asserts that he “has filed an underinsured motorist claim where it properly belongs, in the Superior Court (*continued on next page*)

For the foregoing reasons, I recommend that the motion to dismiss be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 12th day of October 2004.

/s/ David M. Cohen

David M. Cohen

United States Magistrate Judge

Plaintiff

**LIBERTY MUTUAL FIRE
INSURANCE COMPANY**

represented by **JOHN S. WHITMAN**
RICHARDSON, WHITMAN,
LARGE & BADGER
465 CONGRESS STREET
P.O. BOX 9545
PORTLAND, ME 4112-9545
(207) 774-7474
Email: jwhitman@rwlb.com

V.

Defendant

ERIC DUPERE

represented by **D. MICHAEL NOONAN**

for the County of York, Maine.” Motion at [3]. The summons and complaint attached to his motion could not have been filed in York County.

SHAHEEN & GORDON, P.A.
P.O. BOX 977
DOVER, NH 3821
603-749-5000
Email: mnoonan@shaheengordon.com